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No. 83-474

In The

Supreme Court of the United States

October Term, 1983

STUART WESTERN, INC.,

Petitioners,

vs.

COOLING SYSTEMS AND FLEXIBLES, INC.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the relevant inquiry for damages in a catalog infringement case is one of profits and losses resulting from the infringement, or is inquiry strictly limited to the narrow question of whether a profit or loss resulted from the actual sale of the catalog itself.

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Respondents Cooling Systems and Flexibles Inc., submit this Memorandum in response to the Petition of Stuart Western, Inc. for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The factual representations and legal theory propounded by the petitioners do not justify a review by the Supreme Court for the following reasons:

1. Petitioners have mischaracterized the nature of this action and the decision by the Ninth Circuit in order

to invoke a review by this Court. The decision by the Ninth Circuit Court of Appeals does nothing more than re-state the clear meaning of 17 U. S. C. 504(b).

17 U. S. C. 504(b) states that: "The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. . . ."

2. The Petitioner totally mischaracterized the Ninth Circuit opinion by stating that it extends copyright monopoly to areas not within the exclusive rights granted by the monopoly. There is no extension of copyright monopoly if recovery of actual damages and profits are limited to those attributable to the infringement.

3. The trial court must first determine whether or not any damages or profits are, in fact, attributable to the infringement. Lack of profit on the sale of the actual radiator catalog itself does not preclude the existence of damages and profits attributable to copyright infringement.

4. There is no unfairness to petitioner from the Ninth Circuit opinion. If, in fact, petitioner can prove at trial that facts other than copyright infringement were responsible for sale of petitioner's radiators, or a reasonable basis exists for apportioning profits, the procedure sanctioned in *Sheldon v. Metro Goldwyn Pictures Corp.*, 309 U. S. 390, 84 L. Ed. 824, 60 S. Ct. 681 (1939) may be followed.

5. The question is not ripe for decision as no factual determinations have been made by trial to properly determine the questions for appeal.

6. There are no constitutional issues of great importance to be resolved in this case, as the Ninth Circuit Court of Appeals found their clarification and interpretation of 17 U. S. C. 504(b) so obvious as to merit only a Memorandum of Opinion, not even certified for publication.

7. Great delay has already been caused through the erroneous dismissal before trial of respondents' complaint for copyright infringement. Further delay through granting of a Writ would not be in the interest of justice.

CONCLUSION

The petitioner's request is premature and inappropriate as the decision by the Ninth Circuit is based on the clear and unambiguous language of 17 U. S. C. 504(b).

Respectfully submitted,

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Attorney for Respondents
COOLING SYSTEMS & FLEXIBLES, INC.

Dated: October 1983